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**IN THE
COURT OF APPEALS OF INDIANA**

ALLEN GARY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 71A04-0805-CR-307

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D03-0603-FD-270

September 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Allen Gary appeals his conviction in a bench trial of sexual battery, as a class D felony.¹

We affirm.

ISSUE

Whether the evidence was sufficient to support Gary's conviction.

FACTS

Teratha Jones was an instructor at a center for the developmentally disabled. Jones taught daily living skills to developmentally disabled adults, including U.F. Gary worked at the center as a janitor.

In the afternoon of January 10, 2006, Gary helped Jones escort some students from the lunchroom back to the classroom. Jones became concerned when she realized that K.D. had been in the restroom since lunchtime. Because she was short on staff, she asked U.F. to check on K.D. Gary left the classroom "shortly after [she] told [U.F.] to go and check on [K.D.]" (Tr. 76).

Jones started to worry about both U.F. and K.D. "because neither one of them came back" and went to check on them. *Id.* As she walked into the bathroom, she did not see or hear anyone. The doors on the three stalls were partially open. When Jones opened the door on one of the stalls, she saw U.F. standing with her back against the stall's partition wall. Gary was standing in front of and facing U.F. Jones "saw [U.F.]

¹ Ind. Code § 35-42-4-8.

with her shirt and her bra up[.]” (Tr. 83). Gary’s hands were on U.F.’s breasts. Gary appeared to be “caress[ing]” her breasts. (Tr. 84). U.F. “was moving like . . . she was feeling good.” *Id.* Jones reported the incident to her supervisor.

The Attorney General’s Office of Medicaid Fraud assisted the South Bend Police Department’s Special Victims Unit with their investigation of the incident. After Gary signed a waiver of rights, Investigator Thomas Trennery and Detective Meredith Mickels conducted a videotaped interview of Gary. When Detective Mickels asked whether he “felt on [U.F.’s] breasts—copped a feel,” Gary answered in the affirmative. (Ex. 5).

The State charged Gary with class D felony sexual battery on March 10, 2006. On November 2, 2007, the trial court held a bench trial, during which Dr. Sheridan P. McCabe, a psychologist, testified. He testified that he conducted a psychological evaluation of U.F. to determine her “capacity or competency to consent to sexual activity.” (Tr. 19). He found that she was “very passive” and “cooperative” (Tr. 25). He further found her unaware of consequences, with a “[v]ery limited” ability to assess her actions. (Tr. 27). Dr. McCabe testified that U.F. has an IQ of below 36, and “a person with an IQ below 60 is regarded as clearly retarded.” (Tr. 33). He concluded that U.F. has the “mental age” of a three-year-old child and was not competent to consent to being touched. (Tr. 23). The trial court found Gary guilty as charged and sentenced him to two years with one year suspended.

DECISION

Gary asserts that the evidence was insufficient to support his conviction.

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted).

Indiana Code section 35-42-4-8 provides, in part, as follows: “[a] person who, with intent to arouse or satisfy the person’s own sexual desires or the sexual desires of another person, touches that person when that person is . . . so mentally disabled or deficient that consent to the touching cannot be given” commits sexual battery. Gary argues that the State “did not prove that [he] intended to arouse or satisfy anyone’s sexual desires.” Gary’s Br. at 5.

“A person’s intent may be determined from their conduct and the natural consequences thereof and intent may be inferred from circumstantial evidence.” *J.J.M. v. State*, 779 N.E.2d 602, 606 (Ind. Ct. App. 2002). The intent to gratify must “coincide with the conduct” because it is the “purpose or motivation for the conduct.” *Id.*

In this case, Gary caressed U.F.’s bare breasts; he also admitted that he “copped a feel.” (Ex. 5). The usual purpose of such conduct is to arouse or satisfy sexual desires. Furthermore, Jones testified that U.F. “was moving like . . . she was feeling good.” (Tr. 84). Thus, both Gary’s conduct and U.F.’s response support the contention that Gary

touched U.F. with intent to arouse or satisfy either his own sexual desires or the sexual desires of U.F. We therefore find the evidence is sufficient to sustain Gary's conviction.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.